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IN THE

Supreme Court of the United States

OCTOBER TERM, 1970

No. 1156

EDNA F. NEUMAN and MICHAEL E. NEUMAN,
Petitioners

v.

UNITED STATES OF AMERICA, *Respondent*

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1970

No.

ERROL F. NEUMAN and MICHAEL E. NEUMAN,
Petitioners

v.

UNITED STATES OF AMERICA, *Respondent*

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

Petitioners, Errol F. Neuman and Michael E. Neuman, pray that a writ of certiorari be issued to review the judgment of the United States Court of Appeals for the District of Columbia Circuit, affirming a judgment of the United States District Court for the District of Columbia, dated September 5, 1969, convicting them of a violation of 26 U.S.C. § 4762(a).

OPINION BELOW

The opinion of the United States Court of Appeals for the District of Columbia Circuit, not yet officially reported, is reprinted herein as an appendix.

JURISDICTION

The judgment of the United States Court of Appeals for the District of Columbia Circuit was entered on October 29, 1970. A timely petition for rehearing was denied on November 24, 1970. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

STATUTORY PROVISION INVOLVED

26 U.S.C. § 4742(a): "*General requirement.*—It shall be unlawful for any person, whether or not required to pay a special tax and register under sections 4751 to 4753, inclusive, to transfer marihuana, except in pursuance of a written order of the person to whom such marihuana is transferred, on a form to be issued in blank for that purpose by the Secretary or his delegate."

QUESTION PRESENTED

Whether the improper introduction of evidence of an accused's prior similar crimes can ever be deemed harmless error.

STATEMENT OF THE CASE

The facts supporting this petition are simple. The Government offered evidence in a three-day trial that on April 2, 1969, petitioners transferred by prearrangement approximately two pounds of marijuana to two federal narcotic agents, who immediately arrested them.

Petitioners' cross-examination of the two agents and their direct examination of the sole defense witness—

Kenneth Galin, the Government informer who had arranged the meeting which resulted in their arrest—led Government counsel and the trial court to believe that the defense of entrapment had been raised.[1] But the attempt to raise that defense was somewhat less successful than the maiden voyage of the Titanic, for each answer received was one negating the defense, rather than supporting it.[2] On more than one occasion, the trial court commented on petitioners' singular lack of success in what it believed were their efforts to establish that defense.[3] Petitioners agreed and, as a practical matter, were left solely with that defense to which all accused are entitled—the presumption of innocence—based upon the credibility of the narcotic agents.

Nevertheless, even though petitioners had clearly and confessedly failed to raise any issue of entrapment, the

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[1] The Court of Appeals described petitioners' questions as "classic credibility questions relating to inducements offered the informer for his cooperation."

[2] For example: Agent Stutman denied that he had instructed informer Galin to portray the agents (in their undercover capacity) as "tough guys" who were holding Galin's wife as a hostage pending the sale of the contraband (R. 88-89). Informer Galin denied that he had told petitioners that the prospective purchasers (i.e., the agents) were criminals and were "tough." (R. 208) He denied, as had the agents, that he had claimed his wife was being held hostage (R. 209). He also denied that one of the agents had threatened to become violent, and that he (Galin) was so excited that he would have told petitioner Errol F. Neuman anything to get him to go through with the transaction (R. 222).

[3] The trial court made, among others, the following remarks to defense counsel on this issue: "I don't see that you have established any evidence of entrapment yet. He [i.e., agent Stutman] has given negative replies to your questions" (R. 68) "If I thought you had any real substantial evidence of entrapment which you are trying to make out of this case, I wouldn't hesitate to tell you." (R. 226).

Government announced, during the direct examination of defense witness Galin, that it intended to explore the relationship between Galin and petitioner Errol F. Neuman—i.e., the allegation that the former had purchased large amounts of marijuana from the latter on two or three prior occasions and had seen him sell large amounts to others. This testimony was received over objection by petitioners, who correctly claimed that they had not elicited sufficient facts to raise the entrapment issue and did not intend to request an instruction on it. Government counsel, however, referred to the prior sales in his summation and argued from them that the jury could infer that petitioners were "big dealers" (R. 276). Moreover, without a defense request and over objection, the trial court instructed the jury on the issue.

REASONS FOR GRANTING THE WRIT

This petition presents the question whether the improper introduction against an accused of evidence of prior similar crimes can ever be deemed harmless error. We suggest that it cannot be, but that whatever the answer to the question ought to be, this Court should seize this opportunity to provide it.

It has already been established that an error in a criminal case, even one of constitutional magnitude, may properly be deemed harmless, and that the test for resolution of the issue is whether there is a reasonable possibility that the evidence complained of might have contributed to the conviction.[4] It also seems clear that certain errors may never be deemed harmless, regardless of any estimate as to their effect

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[4] See, e.g.: *Chapman* v. *California*, 386 U.S. 18 (1967); *Fahy* v. *Connecticut*, 375 U.S. 85 (1963).

upon the jury.[5] Here, however, is presented a serious question as to whether an error, constitutional or not, should ever be held harmless when the very existence of a rule deeming errors of its type harmless (or possibly so, depending upon the particular facts of the case) will have a serious and possibly disastrous effect upon a defendant's decision concerning the exercise of rights which this Court has long felt obliged to protect.

The analysis and interpretation of any harmless error rule is now the sole province of the appellate courts, and this Court should see to it that it is in those courts that decisions based upon that rule should stay.

An appellate court's finding, after its objective and careful examination of the record, that any given error was harmless, has no effect upon defense counsel's decisions in protecting his client's rights. If the Supreme Court of Michigan holds that the introduction of certain illegally seized evidence did not, all things considered, harm the defendant in the case before it, the lawyer in Lansing may disagree, but will not be affected by that holding in his next criminal case. Whether or not the prosecutor introduces certain evidence is a decision not in defense counsel's control.

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[5] See, e.g.: *Payne* v. *Arkansas*, 356 U.S. 560 (1958) (the introduction of a coerced confession); *Gideon* v. *Wainwright*, 372 U.S. 335 (1963) (denial of right to counsel); *Tumey* v. *Ohio*, 273 U.S. 510 (1927) (absence of an impartial judge). Moreover, it is difficult to believe that the deprivation of certain of an accused's rights could ever be deemed harmless error even though it would be virtuallly impossible to prove prejudice and even though the record of the trial shrieked the guilt of the accused. See, e.g.: *Sheppard* v. *Maxwell*, 384 U.S. 333 (1966) (trial before jurors from a community inflamed by adverse publicity); *Whitus* v. *Georgia*, 385 U.S. 545 (1967) (discrimination in the jury selection process).

But take a different case. Suppose that the New York Court of Appeals held in a given case that the prosecutor's use, on cross-examination of the defendant of a non-coerced confession taken in violation of the *Miranda* rule, was harmless error.[6] Such a ruling would have a profound impact upon the attorney in Albany when he seeks to give a client advice as to whether to testify. The right of a defendant to testify in his own defense is a precious one. On this question, the accused usually seeks his counsel's advice. It is difficult enough for counsel to give such advice even under normal circumstances. But to require him to try to determine whether an error on the scope of cross-examination would, on some day in the future, be deemed harmless error by an appellate court is to stack the deck against the defendant. Counsel, in the midst of a criminal trial or even before, has problems enough. To require him to guess as to whether an imminent erroneous ruling by the trial court would later be considered harmless is to cause him to give advice to his client involving the sacrifice of important rights. See *Simmons* v. *United States*, 390 U.S. 377 (1968), where this Court held that the Constitution could not tolerate a rule which would penalize a defendant for exercising his right to testify at a pretrial hearing to express evidence by allowing use of that testimony against him on the prosecutor's direct case.

We submit that the test for determining the existence of harmless error has not yet been completely formulated by this Court. We suggest that this Court ought

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[6] In New York, as a matter of fact, such conduct is not even deemed error. See, e.g.: *People* v. *Kulis*, 18 N.Y.2d 318 (1966); *People* v. *Harris*, 25 N.Y.2d 175 (1969).

to consider the practical effect of any harmless error rule adopted by any court which would have a chilling effect upon an accused's exercise of his constitutional rights. We ask this Court to consider the problems and the issues raised by this case.

CONCLUSION

For the foregoing reasons, the writ of certiorari prayed for should be granted.

Respectfully submitted,

PATRICK M. WALL
36 West 44th Street
New York, N. Y. 10036
Counsel for Petitioners

APPENDIX

UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 23,694

UNITED STATES OF AMERICA

v.

ERROL F. NEUMAN, *Appellant*

No. 23,695

UNITED STATES OF AMERICA

v.

MICHAEL NEUMAN, *Appellant*

Appeals from the United States District Court
for the District of Columbia

Decided October 29, 1970

Mr. David Povich for appellants.

Mr. John O'B. Clarke, Jr., Assistant United States Attorney, with whom *Messrs. Thomas A. Flannery*, United States Attorney, and *John A. Terry*, Assistant United States Attorney, were on the brief, for appellee. *Mr. James R. Phelps*, Assistant United States Attorney, also entered an appearance for appellee.

Before WRIGHT, McGOWAN and ROBINSON, *Circuit Judges*.

PER CURIAM: Appellants were convicted of acquiring and transferring marijuana in violation of 26 U.S.C. §§ 4744(a) and 4742(a) (1964). The evidence against them is ironclad. They sold hashish, without the required order forms, to two Government undercover agents who arrested them on the spot. On appeal they raise a single issue: whether the defense of entrapment was properly raised over the objection of appellants and evidence of predisposition to commit the crime charged properly admitted against them. The trial court ruled that appellants had in effect raised the issue of entrapment by the questions asked by their counsel of Government witnesses and the Government informer produced by appellants as an adverse witness.

Since a plea of entrapment admits commission of the act charged,[1] we question whether the defense of entrapment can ever be raised except *in terms* by the accused. We have been cited to no case and have found none which holds that the defense can be held to have been raised by inference, implication or estoppel based on ambiguous actions of defense counsel.[2] Obviously, however, it would be unfair if defense counsel could both put the issue of entrapment before the jury through his questioning and still keep the Government from presenting evidence of predisposition by declining formally to plead entrapment as a defense and by declining to request an entrapment instruction at the conclusion of the trial. Consequently, when defense counsel asks questions thought to be sug-

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[1] Some circuits refuse to allow the defense of noncommission of the act charged where the defense of entrapment is also made. *See Harris v. United States*, 5 Cir., 409 F.2d 254 (1969). In this circuit we permit the alternative defenses. *Hansford v. United States*, 112 U.S.App.D.C. 339, 341, 303 F.2d 219,221 (1962) (en banc).

[2] The questions asked by defense counsel were primarily classic credibility questions relating to inducements offered the informer for his cooperation.

gestive of entrapment, he should be instructed to plead the defense or abandon the line of questioning.

The error in raising the defense and admitting the evidence of predisposition over the objection of the accused in the circumstances of this case is harmless error, however, beyond any doubt. *Compare Lopez v. United States*, 373 U.S. 427, 434-437 (1963).

Affirmed.

[Filed Oct. 29, 1970]

Judgment

These cases came on to be heard on the record on appeal from the United States District Court for the District of Columbia, and were argued by counsel. On consideration thereof, it is

ORDERED AND ADJUDGED by this Court that the judgments of the District Court appealed from herein are hereby affirmed.

Per Curiam

For the Court:

NATHAN J. PAULSON
Clerk

Dated: October 29, 1970.

Opinion per curiam.

[Filed Nov. 24, 1970]

Order

On consideration of appellant's petition for rehearing, it is

ORDERED by the Court that appellant's aforesaid petition is denied.

Per Curiam

For the Court:

NATHAN J. PAULSON
Nathan J. Paulson
Clerk

[Filed Dec. 22, 1970]

Order

On consideration of appellants' unopposed petition to recall mandate and stay mandate pending application for certiorari, it is

ORDERED by the Court that the petition be granted and the Clerk of the District Court is directed to return the opinion and certified copy of this Court's judgment as promptly as the business of his office will permit, and it is

FURTHER ORDERED by the Court that the Clerk is directed to stay reissuance of the mandate for a period of 30 days from the date of this order, pursuant to the provisions of Rule 41(b) of the Federal Rules of Appellate Procedure.

Per Curiam

For the Court:

NATHAN J. PAULSON
Clerk

In the Supreme Court of the United States

OCTOBER TERM, 1970

No. 1156

ERROL F. NEUMAN and MICHAEL E. NEUMAN,
PETITIONERS

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

MEMORANDUM FOR THE UNITED STATES IN OPPOSITION

After a trial by jury in the United States District Court for the District of Columbia, petitioners were convicted of transferring marihuana without a written order of the transferee, in violation of 26 U.S.C. 4742(a). Each was sentenced to imprisonment for a period of two to six years and a fine of $10,000. The court of appeals affirmed.

The evidence at the trial showed that an informant, Kenneth Galin, introduced two narcotics agents to

petitioner Errol Neuman, who said he wanted $8,000 for ten pounds of hashish. Errol also offered to deliver 100 kilograms of marihuana per week (Tr. 48-51.). When Michael Neuman arrived, Errol told him to "get the stuff." After Michael handed a duffel bag to one of the agents, both petitioners were arrested (Tr. 52-53, 115-116).

In his opening statement, defense counsel said that the whole truth was that petitioners were there because of Ken Galin, the informant (Tr. 37-38). When the court questioned the relevancy of questions asked in the cross-examination of a government agent regarding the circumstances leading to Galin's employment after his arrest for a narcotics offense, counsel replied, "This is going to be connected up, Your Honor, with evidence of entrapment on the part of (Galin) to obtain this sale by these defendants to those narcotic agents. * * * (T)hat he used efforts which I will argue, Your Honor, were per se entrapment, not even questions of fact, but per se entrapment in these discussions with these defendants" (Tr. 60-61).

The assistant United States attorney immediately gave notice that if the defense of entrapment was going to be raised, the government would offer evidence of petitioner's prior involvement in similar transactions to negative the inference that his unlawful conduct was so induced (Tr. 59). To determine the admissibility of further questioning along this line, the agent was interrogated out of the presence of the jury as to Galin's arrest and subsequent use as an informer (Tr. 59-66). When the court ex-

pressed doubt as to whether this evidence would sustain an inference of entrapment, counsel replied (Tr. 66):

> I can't establish that necessarily. I don't know, I can try to; but I don't think I can really hit it on the head. That will have to come whether I decide to put Ken Galin on the stand.

The court ruled out further interrogation of the witness along these lines at that time, but said he could later be recalled for further cross-examination (Tr. 66-67). The court made several further efforts to ascertain whether the defense of entrapment was going to be raised, even offering to let Galin be put on the stand for questioning out of the presence of the jury (Tr. 70-71, 73, 74). After the jury was recalled, counsel was permitted to cross-examine the agent as to the instructions he gave Galin (Tr. 75-79). The following exchange subsequently took place (Tr. 90-91):

> THE COURT: If you have witnesses who might show this agent planted the seed in the mind of these men here that they would not have committed this crime, if they committed the crime, had it not been for his scheming manner of inducing a couple of innocent boys to commit this crime. You don't have that picture yet.
>
> MR. POVICH: I am picking away at it.

Petitioner did not take the stand in his own defense, but was permitted to call Galin as an adverse witness and to cross-examine him (Tr. 197-199). Galin testified that he had been arrested on a narcotics charge, but was allowed to plead to a misdemeanor because of his assistance to the Bureau

of Narcotics and Dangerous Drugs (Tr. 200-203). He arranged the transfer of narcotics involved here and admitted that it was in his personal interest to do so (Tr. 203-205). He admitted that he had persuaded petitioner to attend the meeting that resulted in his arrest, but denied the use of threats against petitioner or his wife (Tr. 209-211). The court ruled that petitioner had raised the defense of entrapment and permitted the government to cross-examine Galin, over petitioner's objection, regarding purchases of marihuana which he had previously made from petitioner (Tr. 229-236). The court also gave approved instructions as to entrapment (Tr. 298-300).

In a brief *per curiam* opinion, the court of appeals ruled that the defense of entrapment should not be deemed raised by ambiguous actions of defense counsel but that, if counsel asked questions suggestive of entrapment, he should be instructed to plead the defense or abandon the line of questioning. However, finding the evidence here "ironclad", the court concluded that the error in admitting rebuttal evidence of predisposition was harmless.

Petitioner's argument that improper introduction of evidence of similar crimes can never be harmless error is without merit. The undisputed evidence in this case was that, in the course of bargaining, petitioner Errol Neuman offered to make substantial weekly deliveries of drugs to the agents. In that context, Galin's testimony that he had purchased marihuana on prior occasions, and had seen petitioners make other sales, was properly deemed harmless.

It is therefore respectfully submitted that the petition for a writ of certiorari should be denied.

ERWIN N. GRISWOLD,
Solicitor General.

JANUARY 1971.

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